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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-1188

JAMES EDGAR,

Appellant,

v.

MITE CORPORATION AND MITE HOLDINGS, INC.,

Appellees.

On Appeal From The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE COMMONWEALTH OF VIRGINIA AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S POSITION

MARSHALL COLEMAN
Attorney General

WALTER H. RYLAND
Chief Deputy Attorney General

KAREN A. GOULD
Assistant Attorney General

Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219
(804) 786-2071)

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I.

INTEREST OF *AMICUS CURIAE*

The Commonwealth of Virginia has a substantial interest in the outcome of this litigation. In 1968, Virginia's General Assembly enacted the Take-Over-Bid Disclosure Act. Va. Code Ann. §§ 13.1-528 to -541 (1978 Repl. Vol.). This Act was the first of its kind, antedating even the Williams Act, which Congress passed later in the same year. The Virginia Act is very similar to the Illinois statute that is at issue in the case at bar. Ill. Ann. Stat. ch. 121½ §§ 137.51-137.70 (Smith-Hurd

Cum. Supp. 1980). Both Virginia and Illinois have statutory provisions that require a twenty-day cooling off period.[1]

II.
SUMMARY OF ARGUMENT

In 1979, the Securities Exchange Commission [hereinafter "SEC"] proposed numerous regulations to supplement the Williams Act. These proposed regulations were adopted and became effective in 1980. These regulations are in excess of the Commission's jurisdiction and are therefore void. Accordingly, this case should be decided on the issue of whether the Williams Act preempts state statutes.

The Supremacy Clause of the United States Constitution does not preempt the Illinois takeover statute as being inconsistent with the Williams Act. In 1968, Congress passed the Williams Act, which sets out a broad policy for persons desiring to takeover an ongoing corporate business. The legislative history of the Williams Act is void of any language that implies or expresses Congress' intent to preempt any State regulation of tender offers. Furthermore, there does not exist any direct or indirect conflict between the Illinois takeover statute and the provisions found in the Williams Act relating to tender offers. Therefore, the Illinois statute is not violative of the federal takeover statute.

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[1] Ill. Stat. Ann. ch. 121½ § 137.54E (Smith-Hurd Cum. Supp. 1980) provides:

> A take-over offer shall become registered 20 business days after the date of filing the registration statement or an Amendment thereto with the Secretary. . . .

Va. Code Ann. § 13.1-531(a) (1980 Cum. Supp.) provides:

> No offeror shall make a take-over bid unless at least twenty days prior thereto he shall file with the Commission and with the registered agent of the offeree company a statement containing all the information required by § 13.1-531(b) or a Schedule 14D-1. . . .

III.

ARGUMENT

A. The SEC Lacks Authority to Supersede the Illinois Statute by Adopting Regulation 14D

The Illinois takeover statute and the Williams Act have identical goals and purposes underlying their respective legislation. "The sole purpose of the Williams Act was the protection of investors who are confronted with a tender offer." *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 35 (1977). The foremost purpose of the Illinois takeover statute is the adequate protection of securityholders.

> The purpose of this Act shall be to protect the interests of Illinois securityholders of companies having a close connection with this State without unduly impeding take-over offers, and this Act shall be interpreted so as to strike a balance that does not favor either management of a target company or an offeror.

Judicial review of agency action requires the reviewing court to set aside informal rulemaking that is in excess of its statutory jurisdiction. 5 U.S.C. § 706(2). Under this standard it is clear that the SEC may not issue regulations which exceed its authority. To uphold the validity of Regulation 14D, this Court must "reasonably be able to conclude that the grant of authority contemplates the regulation issued." *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 308 (1979). Because Regulation 14D contemplates the preemption of the Illinois takeover statute, this Court should probe the language and reasoning of the enabling legislation. *Chrysler*, 441 U.S. at 308.

The language, logic and history of the Williams Act does not suggest that Congress intended preemption, but instead suggests collaboration between the State and federal governments. The SEC appears to realize this fact, and also that it lacks authority to promulgate rules which are preemptive of State takeover statutes. In early 1980, before Regulation 14D became effective, the SEC sent legislation to Congress which, if enacted, would preempt State takeover statutes. It urged Congress to adopt its proposals because it had concluded that

"only Congress can quickly and precisely establish the bounds within which the national policy requires the exclusion of all but the national law."[2] The attitude of the SEC, as reflected by the promulgation of Regulation 14D, conflicts with the express wishes of Congress. *See* § 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a).

Regulation of securities is an area of the law that the States occupied long before the federal government began to legislate. *See Hall* v. *Geiger-Jones Co.*, 242 U.S. 539 (1917) (the Ohio "Blue Sky Law" examined as to its constitutionality). Whenever the subject matter concerns an area of the law that has been traditionally occupied by the States, there is an assumption that the State statute in question should not be ousted unless Congress so intended. *Rice* v. *Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This assumption would likewise be applicable to any regulation promulgated by a federal agency. In *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945), the Court was concerned with whether or not the Interstate Commerce Commission could, pursuant to its enabling statute, promulgate certain preemptive regulations. The Court held that "Congress . . . will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless its purpose to do so is clearly manifested. . . ." *Southern Pacific Co.*, 325 U.S. at 766.

The Illinois and Virginia Acts are designed to insure full and fair disclosure to the securityholder of all the material information, so that if and when the securityholder does accept the offer, he will be trading with adequate information and at a price that reflects the intention of the bidder to effect a takeover. Part of this informational process allows the target company an adequate opportunity to defend its position and express its views to the shareholder. *See* 17 C.F.R. § 240.14e-1(a) (1980); 44 Fed. Reg. 70,338 (1979). Yet, the SEC has made only a token recognition of this valuable interest. The SEC has overlooked the fact that the securityholder's original investment was an expression of trust in the management of the target company. As a corollary to this, the target company has a fiduciary duty to protect the company from industrial pirates and asset strippers. *See, e.g., McCandless* v. *Furland*, 296 U.S.

[2] Letter from SEC Chairman Williams to Senator Proxmire, 542 BNA Sec. Reg. & L. Rep. 19 (Feb. 27, 1980).

140 (1936); *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U.S. 371 (1894). The SEC regulation shifts the delicate balance between the bidder and the target company in favor of the bidder at the expense of the securityholder.

B. The Supremacy Clause Does Not Vitiate the Illinois Takeover Statute

When the Williams Act was passed, it was Congress' intent to provide adequate disclosure of all pertinent and material information by the offeror to the target company and to the shareholders of that company. The act was designed to give protection to the investors of the target company. *See* H. Rep. No. 90-1711, 90th Cong., *reprinted in* [1968] U.S. Code Cong. & Ad. News 2811-2815. Nowhere within the Act itself or its legislative history is there language that would suggest Congress intended to supplant state regulations of state securities. In *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware*, 414 U.S. 117, 137 (1973), the Court held that:

> Congress in the securities field has not adopted a regulation system wholly apart from and exclusive of state regulation ... Instead, Congress intended to subject the exchanges to state regulation that is not inconsistent with the federal act.

The Williams Act is no more than a minimum disclosure statute with moderate substantive protections for shareholders. It makes no attempt to regulate all aspects of tender offers. Even if the Act were comprehensive in character, that fact would not be determinative of the issue. In *Head* v. *New Mexico Board of Examiners*, 374 U.S. 424, 429-30 (1963), the Court noted "that the validity of [the preemption claim] cannot be judged by reference to broad statements about the 'comprehensive' nature of federal regulation. ..."

Regulation of securities is an area in which the state and federal governments have long coexisted. In fact, state regulation of securities existed before any federal legislation was ever enacted. *See, e.g., Hall* v. *Geiger-Jones Co.*, 242 U.S. 539 (1917) (the Ohio "Blue Sky Law" examined as to its constitutionality). Securities regulation has been and still is a traditional area of state concern. Whenever a preemption issue concerns a subject matter that has been traditionally occupied

by the States and not the federal government, there is an "assumption that the historic police powers of the States [are] not to be [ousted] by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice* v. *Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

As further evidence that the Williams Act does not preempt state regulations, § 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a), provides:

> [N]othing in this chapter shall affect the jurisdiction of the securities commission . . . of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.

This "section was plainly intended to protect, rather than to limit, state authority." *Leroy* v. *Great Western United Corp.*, 443 U.S. 173, 182 (1979). *See also* Hearings on S. Res. 84 (72d Cong.), 56, and 97 (73d Cong.) before the Senate Committee on Banking and Currency, 73d Cong., 1st Sess., 6577 (1934).

IV.

CONCLUSION

For the abovementioned reasons, the Commonwealth of Virginia respectfully prays that this Honorable Court reverse the decision of the Seventh Circuit Court of Appeals.

Respectfully submitted,

MARSHALL COLEMAN
Attorney General

WALTER H. RYLAND
Chief Deputy Attorney General

KAREN A. GOULD
Assistant Attorney General

Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219
(804) 786-2071)